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Wan Shahriman bin Wan Suleiman v Esso Malaysia Bhd

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HIGH COURT (KUALA LUMPUR) — SUIT NO D-22–301 OF 2008
HASNAH MOHAMMED HASHIM JC
1 NOVEMBER 2011

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Contract — Agreement — Licence agreement — Licence agreement to operate petrol station on land Breach of — Breach of — Whether defendant had committed any breaches of 2001 licence agreement — Whether plaintiff had identified relevant provisions of 2001 agreement as breached by defendant — Whether defendant failed to maintain forecourt of petrol station — Undue influence — Duress — Whether plaintiff was forced or threatened to sign 2006 licence agreement

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Land Law — Licence — Licence agreement to operate petrol station on land — Whether agreement created relationship of landlord and tenant or licensor and licensee — Whether s 7 of the Specific Relief Act 1950 would apply — Specific Relief Act 1950 s 7

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The plaintiff and defendant executed a sale and purchase agreement ('the SPA'), whereby the plaintiff agreed to sell the latter his land situated in Wilayah Persekutuan ('the land') for the sum of RM1.2m. This sale was conditional upon the plaintiff being appointed as the dealer of the defendant's petrol station to be built on the land. The parties thus executed a licence agreement wherein it was agreed that the plaintiff would be granted a licence to operate the Esso petrol station for a period of five years with an option to renew the same for a further five years. It was also agreed that the licence would not create an interest in the land. The first licence agreement was renewed for a further period of five years. When this second licence agreement expired, it was not renewed. Instead the defendant issued the plaintiff a new licence agreement with new terms and conditions ('the 2001 agreement'). Although the plaintiff disputed some of the terms and conditions in the 2001 agreement, it eventually signed it. The 2001 agreement was valid for a period of five years from 2001 to 2006. When the 2001 agreement was about to expire the defendant gave the plaintiff another new agreement for the next five years ('the 2006 agreement'). After signing the 2006 agreement, the plaintiff informed the defendant that he was unhappy with the terms of this agreement. Consequently the defendant released the plaintiff from the 2006 agreement and took vacant possession of the land. The plaintiff commenced the present suit against the defendant claiming, inter alia, damages for alleged breaches of the 2001 agreement, a declaration that the 2006 agreement was of no legal purport, invalid and

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unenforceable and damages for wrongful repossession of the petrol station. In its defence the defendant submitted that there was no legal obligation on the defendant under the 2001 agreement to maintain the petrol station in the manner alleged by the plaintiff and that the 2006 agreement, which was executed by the plaintiff on his own volition was valid and binding. The defendant also contended that it was entitled to take over possession of the petrol station when the plaintiff expressed his desire not to continue any longer as the defendant's dealer.

Held, dismissing the claim with costs:

(1) The plaintiff had failed to identify the majority of the relevant provisions of the 2001 agreement, which the defendant was alleged to have breached. It was fundamental that the claimant should first identify the provision that entitled the claimant to assert the claim in question for there to be a breach of contract (see para 28).

(2) Under the 2001 licence agreement, it was the obligation of the plaintiff as the licensee to maintain the driveway and forecourt of the petrol station. The plaintiff was paid a site maintenance allowance 'SMA', semi-annually for such purposes. However, based on the evidence the plaintiff had failed in his responsibility to repair and maintain the forecourt of the petrol station. Thus, the defendant had not breached any of the terms of the 2001 agreement and was not liable to compensate the plaintiff for these losses (see paras 36–38).

(3) The plaintiff had not adduced any evidence of duress or any other form of threat by the defendant. Neither did the plaintiff adduce any evidence of oppression, victimisation nor inequality of bargaining power. In the circumstances it was found that the 2006 agreement was a valid, binding and unenforceable contract between the parties (see paras 45 & 52–53).

(4) The relationship between the plaintiff and the defendant was that of licensee and licensor, because the defendant had granted the plaintiff a licence to operate a petrol station on the land. In the absence of a landlord and tenant relationship s 7 of the Specific Relief Act would not apply, and the defendant was not required to initiate any legal proceedings before taking possession of the petrol station. Therefore, once the licence had been withdrawn, the plaintiff had no right to enter the property (see paras 63 & 65).

[Bahasa Malaysia summary

Plaintif dan defendan memeterai satu perjanjian jual beli ('PJB'), di mana plaintif bersetuju untuk menjual hartanahnya yang terletak di Wilayah Persekutuan ('hartanah') kepada defendan bagi jumlah RM1.2 juta. Jualan ini bersyarat iaitu plaintif dilantik sebagai peniaga stesen minyak defendan yang dibina di atas hartanah tersebut. Oleh itu, pihak-pihak memeterai satu

perjanjian perlesenan di mana dipersetujui bahawa plaintif diberikan lesen untuk menguruskan stesen minyak Esso bagi tempoh lima tahun dengan pilihan untuk memperbaharui lesen tersebut untuk tempoh lima tahun seterusnya. Turut sama dipersetujui ialah lesen tersebut tidak memberikan kepentingan di dalam hartanah tersebut. Perjanjian lesen pertama diperbaharui untuk tempoh lima tahun seterusnya. Apabila perjanjian lesen kedua telah tamat tempoh, perjanjian tersebut tidak diperbaharui. Sebaliknya defendan mengeluarkan satu perjanjian perlesenan yang baru dengan terma-terma dan syarat-syarat baru ('perjanjian 2001'). Walaupun plaintif mempertikaikan beberapa terma-terma dan syarat-syarat di dalam perjanjian 2001, plaintif akhirnya menandatanganinya. Perjanjian 2001 adalah sah bagi tempoh lima tahun daripada 2001 hingga 2006. Apabila perjanjian 2001 hampir tamat tempoh, defendan memberikan kepada plaintif satu lagi perjanjian baru untuk lima tahun seterusnya ('perjanjian 2006'). Selepas menandatangani perjanjian 2006, plaintif memaklumkan kepada defendan bahawa dia tidak gembira dengan terma-terma perjanjian tersebut. Akibatnya defendan melepaskan plaintif daripada perjanjian 2006 dan mengambil milikan kosong hartanah tersebut. Plaintif memulakan guaman ini terhadap defendan mendakwa, antara lainnya, ganti rugi untuk perlanggaran-perlanggaran didakwa untuk perjanjian 2001, satu deklarasi bahawa perjanjian 2006 tidak mempunyai tujuan di sisi undang-undang, tidak sah dan tidak boleh dikuatkuasakan dan ganti rugi untuk milikan semula yang menyalahi undang-undang. Di dalam pembelaannya, defendan menghujah bahawa tidak terdapat kewajipan di sisi undang-undang ke atas defendan di bawah perjanjian 2001 untuk mengekalkan stesen minyak seperti cara yang didakwa oleh plaintif dan bahawa perjanjian 2006, yang dimeterai oleh plaintif atas kemahuannya, adalah sah dan mengikat. Defendan juga menghujah Kan bahawa defendan berhak untuk mengambil alih milikan stesen minyak apabila plaintif meluahkan keinginannya untuk tidak meneruskannya lagi sebagai peniaga defendan.

Diputuskan, menolak tuntutan dengan kos:

(1) Plaintif gagal untuk mengenalpasti sebahagian besar peruntukan-peruntukan perjanjian 2011 relevan, yang dituduh telah dilanggar oleh defendan. Adalah penting bahawa penuntut pada awalnya mengenalpasti peruntukan yang memberikan hak kepada penuntut untuk menegaskan tuntutan yang dipersoalkan untuk menunjukkan perlanggaran kontrak (lihat perenggan 28).

(2) Di bawah perjanjian lesen 2001, adalah merupakan kewajipan plaintif sebagai pemegang lesen untuk menyelenggara jalan masuk dan perkarangan stesen minyak. Plaintif dibayar elaun penyelenggaraan tapak 'EPT' setengah tahun bagi tujuan tersebut. Walau bagaimanapun, menurut keterangan, plaintif gagal untuk membaiki dan menyelenggara perkarangan stesen minyak. Oleh itu, defendan tidak melanggar

mana-mana terma perjanjian 2001 dan tidak bertanggungan untuk membayar ganti rugi bagi kerugian tersebut kepada plaintif (lihat perenggan 36–38).

(3) Plaintif tidak mengemukakan sebarang keterangan ugutan atau mana-mana bentuk ancaman oleh defendan. Plaintif juga tidak mengemukakan sebarang keterangan penindasan, penganiayaan atau ketidakadilan kuasa tawar-menawar. Di dalam keadaan tersebut, didapati bahawa perjanjian 2006 adalah kontrak sah, mengikat dan boleh dikuatkuasakan di antara pihak-pihak (lihat perenggan 45 & 52–53).

(4) Hubungan di antara plaintif dan defendan adalah pemegang lesen dan pelesen, kerana defendan telah memberikan plaintif lesen untuk mengendalikan stesen minyak di atas hartanah. Oleh kerana ketiadaan hubungan tuan tanah dan penyewa, s 7 Akta Relief Spesifik tidak terpakai dan defendan tidak perlu memulakan sebarang prosiding-prosiding undang-undang sebelum mengambil milikan stesen minyak tersebut. Oleh itu, apabila lesen tersebut ditarik balik, plaintif tidak mempunyai hak untuk memasuki hartanah tesebut (lihat perenggan 63 & 65).]

Notes

For cases on agreement in general, see 3(2) *Mallal's Digest* (4th Ed 2011 Reissue) paras 2798–2834.

For cases on license in general, see 8(2) *Mallal's Digest* (4th Ed 2011 Reissue) paras 3611–3635.

Cases referred to

Alec Lobb (Garage) Ltd & Ors v Total Oil GB Ltd [1985] 1 All ER 303, CA (folld)

Bekalan Sains P & C Sdn Bhd v Bank Bumiputra Malaysia Bhd [2011] 5 MLJ 1; [2011] 1 LNS 232, CA (refd)

Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327; [1997] 1 CLJ 625, FC (refd)

Fui Lian Credit & Leasing Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors [1991] 1 CLJ 522; [1991] 2 CLJ 614 (Rep), FC (folld)

MHM Trend Station Sdn Bhd v Petronas Dagangan Bhd [2011] 4 MLJ 95; [2009] 1 LNS 437, CA (refd)

Saad Marwi v Chan Hwan Hua & Anor [2001] 3 CLJ 98, CA (refd)

Sri Kajang Rock Products Sdn Bhd v Mayban Finance Bhd & Ors [1992] 3 CLJ 611 (Rep), HC (refd)

Standard Chartered Bank Malaysia Bhd v Foreswood Industries Sdn Bhd & Anor [2004] 6 CLJ 320, HC (folld)

Sulisen Sdn Bhd v Kerajaan Malaysia [2006] MLJU 341; [2006] 7 CLJ 247, HC (refd)

A *Tee Than Song v Caltex Oil Malaysia Ltd* [1970] 1 MLJ 68; [1969] 1 LNS 187, FC (refd)

Legislation referred to

Evidence Act s 92
B Limitation Act 1953 s 6
Specific Relief Act 1950 ss 7, 7(2), 8

N Chandran (Ranjan Chandran with her) (Ranjan Chitravathy & Nik) for the plaintiff/appellant.
C *Raja Eileen Soraya (Kimberly Lee with him) (Raja Darryl & Loh) for the defendant/respondent.*

Hasnah Mohammed Hashim JC:

BACKGROUND OF CASE
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[1] The plaintiff previously was a registered owner of a piece of land held under GM 770 Lot 26495, District of Petaling, 6¼ Mile, Jalan Sungei Besi, Wilayah Persekutuan ('the said land'). By a letter of offer dated 25 May 1988
E ('the offer') the defendant had offered to purchase the said land of the plaintiff for the sum of RM1,200,000. The plaintiff had accepted the offer but on condition that the plaintiff is to be appointed as the dealer/operator of the proposed petrol station to be erected on the said land.

F **[2]** The defendant agreed with the plaintiff's condition and a sale and purchase agreement dated 12 July 1988 ('the said sale and purchase agreement') was executed between the plaintiff and the defendant. By a letter of offer dated 11 July 1988, the plaintiff was appointed as a dealer of the defendant's petrol station built on the said land.
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[3] After issuance of the letter of offer by the defendant, a license agreement was executed between the plaintiff and the defendant on 1 February 1990 ('the 1990 agreement'). One of the terms of 1990 agreement was that the plaintiff's license will be renewed every five years.
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[4] The plaintiff registered the business of managing the defendant's petrol station under the name of AMS Service Station ('the said petrol station') having its business address at Lot 26495, 6¼ Mile, Jalan Sungei Besi, Petaling, 57100 Kuala Lumpur.
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[5] Among the main terms of the 1990 agreement were as follows:

(a) the defendant grants the plaintiff a license, as a personal privilege creating no interest in the land, to enter upon the station for the purpose of

conducting thereon the business of operating an Esso filling/service station for a probationary period of one year. The defendant may extend the probationary period for such duration as it deems fit but no longer than a further period of six months;

(b) upon completion of the probationary period or such extension(s) thereof to the satisfaction of the defendant, it may in its sole and absolute discretion renew the agreement for a further period of five years, (or in the event the station is built on leasehold property, and the remaining unexpired period of the lease is less than five years, then for such further period) commencing on the day after the completion of the probationary period as aforesaid. Thereafter the defendant shall have the option to renew the agreement with the plaintiff as the licensee for a further period of five years on such renewed terms and condition as may be mutually agreed, upon or failing which, on at least the same terms and conditions as are herein contained, save for this clause and save for the license fee which may be increased by a reasonable amount. The option herein referred to shall be exercised by the defendant by a notice in writing given at least three months prior to the expiration of the term of this agreement; and

(c) notwithstanding any other provision, at any time during the probationary period either party may, in its absolute discretion and without giving any reasons therefore, terminate this agreement by giving notice in writing to the other, such notice to be given at least sixty days prior to the expiration of the probationary period or any extension(s) thereof, but without prejudice to the rights of either party against the other in respect of any antecedent breach of this agreement. In the event of termination the company undertakes to purchase any motor fuels and lubricants remaining at the station at the licensee's existing cost price provided that the condition and quality of the motor fuels and lubricants have not deteriorated.

[6] By a letter dated 22 October 1991, the defendant notified the plaintiff that the defendant agreed to renew the 1990 agreement for five years commencing from 29 May 1991. Pursuant to a letter dated 19 April 1996 the defendant again renewed the 1990 agreement for further period of five years commencing from 29 May 1996 until 29 May 2001.

2001 AGREEMENT

[7] The plaintiff had received a letter dated 29 January 2001 from the defendant whereby the defendant informed that the 1996 agreement expiring

on 28 May 2001 would not be renewed. The defendant then issued the plaintiff a new license agreement with a new terms and conditions included ('2001 agreement').

[8] The plaintiff was unhappy and disputed the new terms and conditions as set out under the 2001 agreement. He also refused to sign the agreement. Amongst the terms and conditions which were not agreed upon by the plaintiff were:

(a) cl 2.2 — a trial period of six months to the plaintiff;

(b) clause 3.4.2 — a minimum purchase for petroleum products;

(c) cl 4.3.9 — minimum number of workers for each station;

(d) cl 7.1 — the defendant could review the monthly fee from time to time; and

(e) schedule 11 — the plaintiff and/or the dealer would be responsible to repair the damage at the driveway of the petrol station which was less than 20 metre square. The plaintiff had requested the area to be downsized to 2 metre square.

[9] The Esso Petroleum Dealers Association Malaysia ('EPDAM') which the plaintiff was a member had negotiated with the defendant to discuss the new terms under the 2001 agreement. The plaintiff signed the 2001 agreement with the defendant on 28 May 2001. The 2001 agreement was valid for a period of five years from 29 May 2001 until 28 May 2006.

[10] After the plaintiff signed the 2001 agreement, the plaintiff contended that the amount of RM33,436.52 had been debited from the plaintiff's statement and there was no problem in the supply of petroleum products.

[11] The plaintiff then requested the defendant to carry out several major repairs and upgrading work at the said petrol station immediately upon signing the 2001 agreement to improve and enhance the image of the said petrol station to enable the sales of petroleum at the said petrol station to increase.

[12] On and about May 2006, the defendant had given the plaintiff a draft of the purported new agreement to be agreed upon and executed by the plaintiff as the 2001 agreement was going to expire. However, the plaintiff and other dealers were not agreeable to the terms and conditions imposed under the purported new agreement as it only benefited the defendant and most of the clauses according to the plaintiff were in the absolute discretion of the defendant.

[13] Among the terms which were not agreeable by the plaintiff was that the plaintiff was only to be given an extension of eighteen months compared to the 1990 agreement of five years extension. Under the new agreement, the defendant could at any time, increase the rental charges and change any other items like ancillary provisions on the appointment of a third party operator to the ancillary services like car wash.

[14] There were a series of meetings held between the defendant and EPDAM from April 2006 until July 2006 to discuss the draft agreement but parties failed to reach an agreement in regard to the new agreement. Consequently vacant possession was taken by the defendant on 16 April 2007.

THE PLAINTIFF'S CLAIM

[15] The plaintiff sought the following reliefs:

(a) a declaration that the draft of the new purported license agreement handed over to the plaintiff by the defendant in or around May 2006 is of no legal purport, invalid and unenforceable;

(b) a declaration that the purported termination of the license granted to the plaintiff in respect of the portion of the land known as GM 770 Lot 26495, District of Petaling, 6 1/4 Mile, Jalan Sungei Besi, Wilayah Persekutuan and the petrol station standing erected thereon is no legal purport and accordingly null and void;

(c) possession of the portion of land known as GM 770 Lot 26495, District of Petaling, 6 1/4 Mile, Jalan Sungei Besi, Wilayah Persekutuan and the petrol station standing erected thereon;

(d) in the alternative the of RM1,457.955 as damages stated in the Schedule at para 27;

(e) general damages;

(f) interest at the rate of 8% from the date of filing until full settlement; and

(g) cost.

THE PLAINTIFF'S CASE

[16] It is the plaintiff's claim that despite the plaintiff having executed the 2001 agreement, the defendant had failed to maintain the said petrol station and had failed, refused and/or neglected to fulfill its promise by not attending to all the damages at the said petrol station. As a result, the plaintiff suffered loss of his income due to the dilapidated condition of the said petrol station.

[17] It is also contended by the plaintiff that from 2001 until 2006, the plaintiff requested the defendant to repair the driveway floor at the said petrol station but was never attended. This had caused the said petrol station to be flooded during rainy days and had caused the plaintiff's sales do drop as the customers patronage also dropped.

[18] No painting job was undertaken at the said petrol station after 2001 which had caused the said petrol station to look dirty and affected the plaintiff's sales volume. The plaintiff had met the defendant's territorial manager to discuss the problem but according to the plaintiff the defendant only made promises without any action being taken.

[19] According to the plaintiff more than once a week, the computer would have a glitch causing the retail price for petrol to go downwards or sometimes upwards by 0.04 cent on several transactions. The plaintiff had reported the matter but the defendant said that the system would be upgraded but this was not done.

[20] Sometime in 2005, the defendant's tanker driver spilled 643 liters of fuel into the drain and it caused a large fire. DCD (drive controlled delivery) was the defendant's programme whereby the tanker driver would be responsible for discharging petroleum products. The station manager or staff could only witness the process. However the plaintiff was held responsible for this mishap.

[21] The defendant charged 1% on any diesel sold using the government fuel subsidy programme. This charge was decided by the defendant. It is contended by the plaintiff that the government was funding the defendant to administer the programme. Further, another 0.015 cents given by the government to the dealers including the plaintiff (for diesel subsidy purchases) was neither passed to the dealers nor the plaintiff.

[22] The plaintiff had also requested for reimbursement for missing credit card transaction due to computer malfunction but was rejected or refused by the defendant. The defendant, according to the plaintiff, penalised the plaintiff and other dealers for loyalty card fraud (SMILES card). There was no security features on these cards. Any customer could pick up a card by signing up at the cashier and as a result the customers' personal particulars could not be verified by the dealers.

[23] A severe computer malfunction lasting through several days caused credit card data to be incomplete. From 15–20 December 2006, the plaintiff lost and/or could not keep track of about RM40,258.55 worth of credit card data. Payments for unknown transactions totaled RM20,322.50. Payment was

withheld by the defendant for Fleetcard and diesel subsidy programme (March 2007).

THE DEFENDANT'S CASE

[24] In relation to the plaintiff's allegation that the defendant had breached its obligations under the 2001 license agreement, it is the defendant's case that:

(a) there was no legal obligation on the part of the defendant under the terms and conditions of the 2001 license agreement to maintain the station in the manner alleged by the plaintiff;

(b) some of the alleged losses invoice claims that are barred by virtue of s 6 of the Limitation Act 1953; the new license agreement was executed by the plaintiff on his own volition in 2006 and was therefore valid and binding; and

(c) however, the plaintiff was subsequently released from his obligations under the new license agreement at the plaintiff's own request.

[25] In relation to the allegation that there had been wrongful repossession of the land and the station, it is contended that the defendant was entitled to take over possession of the station in 2007.

[26] The plaintiff had expressed his desire not to continue any longer as the defendant's dealer. The 2001 license agreement had expired and there was no longer a valid agreement in place after termination of the new license agreement. As a mere licensee, s 7 of the Specific Relief Act 1950 is not applicable.

THE ALLEGED BREACHES OF THE 2001 LICENSE AGREEMENT

[27]

(a) Failure to repair the driveway, failure to paint and computer glitches — loss of RM1,407,000;

(b) installation of outdated computer software — loss of RM4,000;

(c) wrongfully making the plaintiff pay for the spillage of fuel that resulted in a fire — loss of RM1,235;

(d) wrongful charge of 1% diesel on diesel sold and not passing 0.015 cents given by the government to the plaintiff in contravention of the government directives — loss of RM4,500;

(e) missing credit card transactions that were not reimbursed loss of RM520;

(f) wrongfully making the plaintiff pay for loyalty smiles card fraud — loss of RM6,200;

(g) computer malfunctions from 15 December 2006 to 20 December 2006 — loss of RM20,000; and

(h) payments withheld by the defendant for fleetcard and diesel subsidy programmes in March 2007 — loss of RM12,500.

[28] It must from the outset be highlighted that the plaintiff has failed to identify the majority of the relevant provisions of the 2001 license agreement which the defendant is alleged to have breached. It is fundamental, for there to be a breach of contract, the claimant must first identify the provision that entitles the claimant to assert the claim in question. The defendant has also pleaded in the amended defence that certain parts of the plaintiff's claim was made after six years which is the time stipulated under s 6 of the Limitation Act 1953 and is therefore barred.

FINDINGS AND DECISION

Whether the defendant is in breach of the terms of the 2001 agreement as alleged in the amended statement of claim and in particular on the defendant's covenanted obligation to maintain the petrol station located on the land

[29] By virtue of the sale and purchase agreement dated 12 July 1988 (p 56A) the defendant purchased from the plaintiff the land where the petrol station is located. The purchase price of the land was RM1.2m. It was agreed by the parties that the plaintiff would operate the petrol station. This is evidenced from the defendant's letter dated 11 July 1988 (p 181A). The plaintiff operated the petrol station under the business name of Stesyen Servis AMS. A license agreement was executed on 1 February 1990 whereby the plaintiff was given a license by the defendant to operate the petrol station for a period of five years.

[30] Salient features of the license:

(a) probationary period of one year;

(b) the defendant may renew for a further period of five years on such terms and conditions to be agreed upon;

(c) the license does not create an interest in the land; and

(d) the defendant granted the license to the plaintiff a right and license to enter and operate the station on the said land.

[31] On 1 July 2001 the license was renewed. The expiration date of the said license was 30 June 2006 as set out in Schedule 1 of the agreement. Clause 3.1 provides as follows:

Based upon and subject to the terms and conditions of this Agreement and in consideration of the Licensee's payment of Monthly Fee and the Licensee's strict observance of its obligations hereunder, the Company hereby agrees to grant to the Licensee for the duration of the Agreement:

(i) a non-exclusive right to enter the Premises;

(ii) a non-exclusive license to occupy, use and operate the service Station, Facilities, additional Facilities and equipment;

(iii) the right to sell the Company's products …; and

(iv) the right to provide the services specified in Schedule 4 from the service station ….

[32] Clause 6.1 reads:

The Company shall during the duration of the Agreement maintain full ownership of the Facilities and Equipment listed in Schedule 3 and all plumbing, electrical, lighting, and heating and air conditioning fixtures in the service Station.

[33] Clause 6.7 is the provision that deals with repairs and maintenance of the service station:

All repairs and maintenance to Service station, facilities and Equipment shall be in accordance to provisions stated in Schedule 11.

[34] Schedule 11 (p 135/137) Item 3 defines the responsibilities of the parties:

It provides essential information on the segregation of roles and responsibilities between the Licensee and Esso ….

[35] Item 3.0 is the scope of segregation of maintenance and repair responsibilities between the parties. The responsibilities described are extensive and shall include all necessary repairs or where applicable a complete replacement of the scope provided. Driveways and forecourts are listed under Item 4 as follows:

Driveways/Forecourt	Maintenance or Replacement Responsibility
o Minor potholes on premix and interlocking driveway (less than 20 m2)	Licensee
o Kerb / edging touch-up	Licensee
o Concrete driveway	ESSO

o All Gratings on pits and cross over drains	Licensee
o Bollards and protective barriers	Licensee
o Fencing (minor repair and paint of less than 10% of total length)	Licensee
o Yard light lenses	Licensee
o Landscaping	Licensee
o Frontage roadside drain	ESSO
o Main entrance culvert structure (exclude grating covers)	ESSO
o Fuel tank lids	
o Color coding	ESSO
o Wear and tear	ESSO
o Theft or stolen	Licensee
o Paper towel dispensers	Licensee
o Fire extinguishers	
o Periodical testing servicing	Licensee
o Parts replacement and refilling	Licensee
o Certification from authority	Licensee.

[36] It is therefore expressly provided that minor potholes on premix and interlocking driveway less than 20m2 it is the plaintiff's, as the licensee, responsibility. as the licensee, the plaintiff is given site maintenance allowance 'SMA' which is paid semi annually and in advance by the defendant. The SMA stipend is calculated by individual site basis. In general the licensee is expected to perform the majority low risks maintenance works and the licensee may retain the balance of the SMA left over after completing required corrective repairs, preventive and planned maintenance.

[37] The maintenance of the driveway and forecourt is the obligation of the plaintiff as provided under the agreement. It is my considered view that the license agreement defined clearly the responsibilities and obligations of the parties. Based on the evidence, the plaintiff failed to maintain the forecourt even though it is the responsibility of the licensee to do so under the agreement. SMA was given to the plaintiff semi annually and in advance to carry out the repair works.

[38] The agreement being in writing, parole evidence contradicting, varying, adding to or subtracting its terms is inadmissible by virtue of s 92 of the Evidence Act.

[39] No evidence adduced that the defendant has breached any of the terms and conditions of the agreement. Therefore the defendant not liable to

compensate the plaintiff in respect of the losses allegedly suffered in the sum of RM1,457,955.40 including the losses and damages set out in the statement of claim.

Whether the alleged license agreement in or about May 2006 has any true purport in law and as to whether it is binding on the plaintiff

[40] The Court of Appeal in *Bekalan Sains P & C Sdn Bhd v Bank Bumiputra Malaysia Bhd* [2011] 5 MLJ 1; [2011] 1 LNS 232 held:

> …, when there is an offer and an acceptance of that offer, an agreement is in existence and the court will enforce it. In simple contracts the agreement must be supported by consideration to establish the obligation. The parties too must intend the agreement to have legal force because the courts will only enforce what the parties intend should be enforced. The parties must also agree that their agreement must be mutual. And the parties must also be legally capable of reaching a binding agreement and, finally, the subject matter of their agreement must be legal.
>
> In deciding whether the parties have reached an agreement, the law looks for an offer by one party and an acceptance to the terms and conditions of that offer by the other. There would be a bargaining process leading up ultimately to an agreement or meeting of the minds. This is the traditional method of analysis of an offer and an acceptance which has been applied by the courts in determining the formation of the contracts. But for a contract to be formalised, all the terms and conditions must be fulfilled. The failure to fulfil a term or a condition would not give rise to a concluded contract.

[41] Abdul Malik Ishak J in *Sulisen Sdn Bhd v Kerajaan Malaysia* [2006] MLJU 341; [2006] 7 CLJ 247 sets out the following guideline:

> The law of contract is concerned with the mechanics involved in and the principles regulating the formation, performance, continuance and discharge of the parties individually created obligations. The essential elements of any contract are:
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> (a) offer;
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> (b) acceptance;
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> (c) consideration (not required for contracts under seal);
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> (d) intention to be bound;
>
> (e) mutuality;
>
> (f) capacity; and
>
> (g) legality.

The offer and acceptance when taken together would form the 'agreement' and that agreement must be supported by consideration in order to establish the obligation. It is the parties that must intend that the agreement to have legal force and the courts will

only enforce what the parties intend should be enforced. The parties too must agree on the same thing and this would be known as mutuality. The parties too must have the capacity of reaching a binding agreement and the subject matter of the agreement must be legal. Briefly, these are the seven essential elements that must be present before a contract is said to be in existence.

[42] Gopal Sri Ram JCA (as he then was) in *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327; [1997] 1 CLJ 625 said:

> … a party to a contract who, after having concluded his bargain, entertains doubts as to the wisdom of the transaction may be in the unfairly advantageous position to invent all sorts of imaginary terms upon which disagreement may be expressed when the more formal document is being prepared in order to escape from his solemn promise. Businessmen would find the law to be a huge loop-hole and commerce would come to a virtual standstill.
>
> The law leans in favour of upholding bargains and not in striking them down willy-nilly. And its declared policy finds expression in the speech of Lord Wright in *Hillas & Co v Arcos Ltd* [1932] All ER (Rep) 494, where he said:
>
> Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business, may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the court to construe such documents fairly and broadly, without being, too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, verba ita sunt intelligenda ut res magis valeat quam pereat. That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear ….

[43] In *Sri Kajang Rock Products Sdn Bhd v Mayban Finance Bhd & Ors* [1992] 3 CLJ 611 (Rep), VC George J (as he then was) explained the meaning of the word 'contract' in these words:

> To constitute a valid contract there must be separate and definite parties thereto; those parties must be in agreement, that is there must be a consensus ad idem; those parties must intend to create legal relations in the sense that the promises of each side are to be enforceable simply because they are contractual promises and as clear and helpful an enunciation of the principles as any which should guide the court in determining the ever recurring question of whether there has been a contract between the parties is provided by Saville J in *Vitol BV v Compagnie Europeene des Petroles* [1988] 1 Lloyd's Rep 574, at p 576 in the following words: The approach of the English law to questions of the true construction of contracts of this kind is to seek objectively to ascertain the intentions of the parties from the words which they have chosen to use. If those words are clear and admit of only one sensible meaning, then that is the meaning to be ascribed to them — and that meaning is taken to

represent what the parties intended. If the words are not so clear and admit of more than one sensible meaning, then the ambiguity may be resolved by looking at the aim and genesis of the agreement, choosing the meaning which seems to make the most sense in the context of the contract and its surrounding circumstances as a whole. In some cases, of course, having attempted this exercise, it may simply remain impossible to give the words any sensible meaning at all in which case they (or some of them) are either ignored, that is to say, treated as not forming part of the contract at all, or (if of apparent central importance) treated as demonstrating that the parties never made an agreement at all, that is to say, had never truly agreed upon the vital terms of their bargain.

[44] In the case *Tee Than Song v Caltex Oil Malaysia Ltd* [1970] 1 MLJ 68; [1969] 1 LNS 187 it was held that:

… that every man should be held to his bargain if there is a concluded agreement and the terms are clear. It is implicit from what the appellant has himself stated in his affidavit, that the sufficiency of 30 days notice was on his mind when he signed the agreement He was therefore fully aware of the stipulations as to notice. The agreement being in writing, parole evidence contradicting, varying, adding to or subtracting its terms is inadmissible by virtue of s 92 of the Evidence Ordinance. Equitable relief is out of the question. As Viscount Simonds said in *Campbell Discount Co Ltd v Bridge* [1962] AC 600, 614:

I must dissent, as Harman LJ did, from the suggestion that there is a general principle of equity which justifies the court in relieving a party to any bargain if in the event it operates hardly against him. In particular cases, for example, of expectant heirs or of fiduciary relationship, a court of equity (and now any court) will if the circumstances justify it, grant relief. So also if there is duress or fraud 'which unravels all'. In the present case there is nothing which would justify the court in granting relief ….

[45] The plaintiff contended that he was forced to sign the agreement. However no evidence was adduced at all to support this allegation of duress or to show any other form of involuntariness on the part of the plaintiff. No evidence to show that the plaintiff was under any form of threat by the defendant forcing the plaintiff to sign the agreement. In the instant case there was an offer by the defendant and an acceptance of the terms by the plaintiff. The plaintiff had signed the license agreement of 2006 voluntarily as evidenced on p 963 bundle C2.

[46] It is the submission of learned counsel for the plaintiff that the defendant in attempting to procure the 2006 license agreement the defendant had practiced unfair advantage. It is further submitted by learned counsel for the plaintiff that the 2006 license agreement was unconscionable and unenforceable.

[47] Clement Skinner J (as he then was) in *Standard Chartered Bank Malaysia Bhd v Foreswood Industries Sdn Bhd & Anor* [2004] 6 CLJ 320 referred to the case of *Saad Marwi v Chan Hwan Hua & Anor* [2001] 3 CLJ 98 where the Court of Appeal adopted the English doctrine of inequality of bargaining power and applied it in a broad and liberal way in Malaysia.

[48] In *Fui Lian Credit & Leasing Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors* [1991] 1 CLJ 522; [1991] 2 CLJ 614 (Rep), (this case was referred to by the courts in the aforementioned cases) Chong Siew Fai J (as he then was) said at p 526 (p 619) said:

> In order that a party may free himself from complying with an agreement he had entered into, he must show that the bargain or some of its terms was unfair and unconscionable. It is not enough to show that, in the eyes of the court, it was unreasonable. A bargain cannot be unfair and unconscionable unless it is shown that one of the parties to it has imposed an objectionable term in a morally reprehensible manner, that is to say, in a way which affects his conscience or has procured the bargain by some unfair means. *Multiservice Bookbinding Ltd & Ors v Marden* [1987] 2 All ER 489.

[49] His Lordship Chong Siew Fai J, cited the case of *Alec Lobb (Garage) Ltd & Ors v Total Oil GB Ltd* [1985] 1 All ER 303 (CA), (at p 620):

> In *Alec Lobb Ltd v Total Oil GB Ltd*, Dillon LJ rejected the contention that where there was unequal bargaining power, the test was whether its terms were fair and reasonable and that it was unnecessary to consider whether the conduct of the stronger party was oppressive or unconscionable. He went on (p 313): Inequality of bargaining power must anyhow be a relative concept. It is seldom in negotiations that the bargaining powers of parties are absolutely equal. An individual wanting to borrow money from a bank, building security or other financial institution in order to pay his liability or buy name property he urgently wants to acquire will have virtually no bargaining power; he will have to take or leave the terms offered to him. So, with house property in a seller's market, the purchaser will not have equal bargaining power with the vendor. But Lord Denning MR did not envisage that any contract entered into in such circumstances would, without more, be reviewed by the courts by the objective criterion of what was reasonable: see *Lloyds Bank Ltd v Bundy* [1974] QB 325 at p 336. The courts would only interfere in exceptional cases where as a matter of common fairness it was not right that the strong should be allowed to push the weak to the wall. The concept of unconscionable conduct and of the exercise by the stronger of coercive power are thus brought in.

[50] The English Court of Appeal in *Alec Lobb* held that:

> … where one party had acted extortionately, oppressively or coercively towards the other, the court would in fairness set aside a transaction so made. However, a transaction was not rendered harsh or unconscionable merely because the parties are of unequal bargaining power and the stronger party had not shown that the terms of

agreement was fair, just and reasonable. Furthermore, a transaction was not unconscionable merely because a party was forced by economic necessity to make it. On the facts, although the plaintiffs had no realistic alternative, no pressure had been exerted on them by the defendant, which was reluctant to enter into the transaction, and furthermore the plaintiffs themselves had sought the defendant's assistance to avert financial collapse and had sought the prior advice of their solicitors and accountant, which they had chosen to ignore. Accordingly the judge was right to find that the defendant's conduct was not unconscionable or oppressive ….

[51] Clement Skinner J in the *Standard Chartered Bank Malaysia Bhd*'s case said that:

… To render a transaction as being unfair and unconscionable there must be some evidence of victimisation or taking advantage of another's weakness or of actual or constructive fraud or other circumstances that will lead the court to come to that conclusion. But as I said earlier, no such circumstances have been shown here by the first defendant that would cause the court to say that the allegations need to be investigated further at a trial …

[52] No evidence was led by the plaintiff to show that there was any form of oppression, victimisation or inequality of bargaining power.

[53] It is also the submission of the plaintiff that the 2006 license is void ab initio as the terms of the license were in breach of the Kementerian Perdagangan Dalam Negeri ('the Ministry') several circulars and directives. However no evidence was tendered by the plaintiff that the defendant had breach any of the directives of the Ministry.

[54] Applying the principles enunciated in the cases mentioned above I am of the considered view that there is an existence of a valid, binding and enforceable contract between the parties.

Whether the taking over the possession of the petrol station by the defendant on 16 April 2007 when the plaintiff was abroad is in breach of the Specific Relief Act 1950 and in particular s 7 entitling the plaintiff to an order for possession of the said petrol station

[55] The 2001 license agreement was extended until 23 November 2006 and during this period the defendant continued to supply products to the plaintiff. The plaintiff signed the 2006 license agreement on 30 November 2006 and sent by facsimile the signed portion of the agreement (pp 1 and 45 of the agreement: pp 178–180A).

[56] Subsequently by a letter dated 9 January 2007 the plaintiff informed the defendant that he was unhappy with the terms and conditions of the agreement. By a letter dated 9 March 2007 the defendant informed the plaintiff that they would release him from the license agreement and also notified him as to the arrangement to hand over the vacant possession of the service station. The defendant also sent a letter dated 11 April 2007 to the plaintiff by post, by courier and by hand notifying him that the defendant would be taking back the service station on 16 April 2007. The plaintiff gave evidence denying having received the said letter. DW2, Encik Rusihan Anwar bin Zaihan, Retail Area Manager of Exxonmobil Malaysia Sdn Bhd gave evidence that after the letter of 11 April 2007 was sent he had tried to call the plaintiff to remind him of the plan to take over the station on 16 April 2007. He was informed that the plaintiff was overseas at that point of time. The letter was then hand delivered on 13 April 2007 and was handed over to the plaintiff's employee, Ruslan. Ruslan was present when the defendant came to take over the service station on 16 April 2007.

[57] The counsel for the plaintiff submitted that at all material time that plaintiff was the legitimate occupier having legitimate occupancy of the service station. The defendant is obliged to have got an order for possession and not to take possession by force. The counsel in his submission referred to s 8 of the Specific Relief Act 1950 and state that the defendant is in law not permitted to take possession of the station otherwise than by instituting proceedings in court for the recovery of the station. The plaintiff had not consented to the defendant taking possession of the station nor had the defendant taken any legal proceedings for possession of the service station.

[58] The learned counsel for the plaintiff urged this court to look into the entirety of the agreement to determine the actual nature and purport of the agreement. It is submitted that the nature and quality of the occupancy is in fact a tenancy agreement in respect of the service station as between the parties.

[59] To determine whether or not an agreement creates the relationship of landlord and tenant or that of licensor and licensee the intention of the parties is of paramount consideration. Clause 8(ii) of the 1990 agreement stipulates as follows:

> The Licensee hereby confirms and admits that this License shall not operate as a tenancy or agreement for tenancy of the land of station under the Control of Rent Act or any written or other law in force for the time being and this Agreement shall for no purpose be construed or interpreted as creating any tenancy or agreement for tenancy.

[60] Similar provision was also incorporated in the 2001 license agreement

(cl 3.2.2) and the 2006 agreement (cl 3.2.2). Therefore even looking at the agreement in its entirety, the intention of the parties and the conduct of the parties it was not intended to ever create a tenancy. The plaintiff's occupation of the land was by virtue of the license granted by the defendant the non exclusive right to operate the station.

[61] Section 7 of the Specific Relief Act 1950 provides as follows:

(1) Subject to subsection (2), a person entitled to the possession of specific immovable property may recover it in the manner prescribed by the law relating to civil procedure.

(2) Where a specific immovable property has been let under a tenancy, and that tenancy is determined or has come to an end, but the occupier continues to remain in occupation of the property or part thereof, the person entitled to the possession of the property shall not enforce his right to recover it against the occupier otherwise than by proceedings in the court

(3) In subsection (2) 'occupier' means any person lawfully in occupation of the property or part thereof at the termination of the tenancy.

[62] In the case *Tee Than Song v Caltex Oil Malaysia Ltd* [1970] 1 MLJ 68; [1969] 1 LNS 187 it was held that:

A case closely parallel to this is *Thompson v Park* [1944] 1 KB 408, 410 where the owner of premises had revoked a licence to use them granted to another person and an interim injunction was granted to restrain the former licensee from trespassing on the premises, even though he might have a claim for damages for breach of contract against the owner of the premises in respect of the revocation of the licence. In my view the judgment of Goddard LJ is so peculiarly appropriate that I would quote it in extenso: It is a strange argument to address to a court of law that we ought to help the defendant who has trespassed and got himself into these premises in the way in which he has done and to say that that would be preserving the status quo and a good reason for not granting an injunction. The strength of the argument which was put forward on the defendant's behalf was that, assuming that there had been a breach of contract on the part of the plaintiff, the defendant had a right to be where he was. That is an entire misconception of the legal position, which was that the defendant was a licensee on the premises. That licence has been withdrawn. Whether it has been rightly withdrawn or wrongly withdrawn matters nothing for this purpose. The licensee, once his license is withdrawn, has no right to re-enter on the land. If he does, he is a common trespasser. The law is properly laid down in the following passage in *Salmond on Torts*, (9th Ed), at p 258: He who is ejected from land by the licensor in breach of his licence, or is otherwise disturbed by the licensor in the exercise of it, has even at common law, and notwithstanding *Wood v Leadbitter,* (1845) 13 M & W 838 a good cause of action in contract' — see *Kerrison v Smith* [1897] 2 QB 445 — 'If, however, the licensee insists, notwithstanding the revocation of his licence (eventhough it is thus premature and wrongful) in entering or remaining on the land or in otherwise exercising his licence, he becomes at common law a trespasser or other wrongdoer, and liable in an action accordingly at

A the suit of the licensor. The rule is an illustration of the difference between a legal power to do a thing effectively and a legal right or liberty to do it lawfully. A licensor has at common law the power to revoke the licence at any time, but he has no right to revoke it before the expiration of the term'. As this is an interlocutory proceeding it is convenient, instead of going through a large number of cases, simply to state the opinion of a leading text-book writer of great authority with which I entirely agree.

B

[63] The defendant granted a license to the plaintiff to operate the service station. Therefore the relationship between the parties is not as a landlord and tenant but as a licensee and a licensor.

C

[64] The Court of Appeal in *MHM Trend Station Sdn Bhd v Petronas Dagangan Bhd* [2011] 4 MLJ 95; [2009] 1 LNS 437 held:

D The only issue before us is whether the respondent is entitled to enter upon and retake possession of the petrol station in question without an order of court in that behalf. At common law, where a licence is terminated, the licensee becomes a trespasser and the court in the exercise of its jurisdiction and acting on equitable principles will ordinarily refuse injunctive relief in such a case. If authority is required for this proposition you need look no further than *Tee Than Song v Caltex Oil Malaysia Ltd* [1970] 1 MLJ 68; [1969] 1 LNS 187. But, says learned counsel for

E the appellant, that principle has been altered by statute. And he refers us to s 7(2) of the Specific Relief Act 1950. That sub-s reads as follows:

Where a specific immovable property has been let under a tenancy, and that tenancy is determined or has come to an end, but the occupier continues to remain in occupation of the property or part thereof, the person entitled to the possession of

F the property shall not enforce his right to recover it against the occupier otherwise than by proceedings in the court. Subsection 3 provides as follows:

In sub-s (2) 'occupier' means any person lawfully in occupation of the property or part thereof at the termination of the tenancy.

G

4. Now the operative words in the second sub section of s 7 are 'where a specific immovable property has been let under a tenancy'. It is plain that the subsection postulates, a letting, that is to say the creation of the relationship of landlord and tenant. In the absence of such a relationship the subsection does not bite. So, really speaking, the appellant has no answer whatsoever to the assertion by the respondent

H of its rights under the dealership agreement. In our judgment the common law position as explained in *Tee Than Song v Caltex Oil Malaysia Ltd* [1970] 1 MLJ 68; [1969] 1 LNS 187 applies with full force to the facts before us. It follows that the learned judge was entirely correct in refusing the injunction sought.

I **[65]** Since the relationship between the parties is a licensor and that of a licensee applying the principles enunciated by the Court of Appeal in the case mentioned above, s 7 of the Specific Relief Act is not applicable. Therefore, once the license has been withdrawn the plaintiff has no right to enter the property.

[66] Based on the reasons set out above I am satisfied that the plaintiff failed to prove its claim on a balance of probabilities against the defendant and dismissed the plaintiff's claim with cost.

Claim dismissed with costs.

Reported by Kohila Nesan